90-1388

No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

COALITION OF CITIES FOR AFFORDABLE UTILITY RATES,
OFFICE OF PUBLIC UTILITY COUNSEL,
CITY OF BRIDGE CITY, *et al.*, and
PUBLIC UTILITY COMMISSION OF TEXAS,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the standards for giving preclusive effect to agency decisions, enunciated in *United States v. Utah Construction and Mining Co.*, 384 U.S. 394 (1966), apply to the states by virtue of the due process clause of the Fourteenth Amendment?

2. Whether, under *Utah Construction*, due process is violated:

   a. if a party to an administrative proceeding is precluded by a state court from further litigating an issue before an administrative agency (1) when the agency did not determine that issue, but expressly deferred it for consideration, in the mistaken belief it had the legal power to defer a decision and (2) when the effect of such state court ruling is to preclude the agency from considering the prudence of a $1.453 billion investment as to which no prudence determination has ever been made?

   b. if a state court precludes agency consideration of an issue which the parties did not have a full and fair opportunity to litigate because the administrative agency announced a new and specifically prescribed proof requirement only after the close of evidence without affording the parties the opportunity to then submit evidence conforming to the altered standard of proof?

3. Whether the constitutionally-mandated national interest requiring rate-making agencies to balance investor and consumer interests in reaching a just and reasonable end result is violated by a state court ruling which precludes consideration of the prudence of a $1.453 billion investment as to which the agency had expressly deferred a decision?

LIST OF PARTIES BELOW

The parties before the Supreme Court of Texas were:

Petitioners:

Coalition of Cities for Affordable Utility Rates (West Orange, Conroe, Panorama Village, Willis, Cut-N-Shoot, and Somerville)

Office of Public Utility Counsel

Cities of Bridge City, Groves, Nederland, Port Arthur, Port Neches, and Vidor

Respondents:

The Public Utility Commission of Texas
Gulf States Utilities Company [1]

Amicus Curiae:

North Star Steel Texas, Inc.
State of Texas

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[1] Gulf States Utilities Company has no parent corporation. All of its subsidiaries are wholly owned.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Gulf States Utilities Company, respectfully prays that a writ of certiorari issue to review a judgment of the Supreme Court of Texas.

OPINIONS BELOW

The decision of the Supreme Court of Texas is reported as *Coalition of Cities for Affordable Utility Rates v. Public Utility Comm'n*, 798 S.W.2d 560 (Sept. 12, 1990), and is reproduced in the appendix to this petition at pages

1 to 20. On November 28, 1990, the Texas Supreme Court overruled motions for rehearing filed by Gulf States Utilities Company ("Gulf States" or the "Company") and the Public Utility Commission of Texas ("P.U.C." or the "Commission"). That unpublished order is reproduced in the appendix at page 34. The mandate of the Texas Supreme Court was issued on December 27, 1990 and is reproduced in the appendix at pages 36 to 37.

The September 20, 1989 decision of the Court of Appeals for the Third Supreme Judicial District of Texas is reported as *Public Utility Comm'n v. Coalition of Cities for Affordable Utility Rates*, 777 S.W.2d 814, and is reproduced in the appendix at pages 21 to 27. The Court of Appeals overruled rehearing in an unpublished opinion, dated October 11, 1989, which is reproduced in the appendix at page 35.

The July 10, 1989 decision of the 250th District Court of Travis County, Texas was not reported. It is reproduced in the appendix at pages 28 to 33.

JURISDICTION

The judgment sought to be reviewed was entered by the Supreme Court of Texas on September 12, 1990 and its order overruling motions for rehearing was entered on November 28, 1990. Jurisdiction in this Court exists by certiorari pursuant to 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in this matter is the Fourteenth Amendment to the United States Constitution. The first Section of that Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No statutory provisions are at issue.

STATEMENT OF THE CASE

Gulf States seeks review of a decision of the Supreme Court of Texas which held that collateral estoppel and res judicata barred Gulf States from demonstrating to the P.U.C. in any future rate case the prudence of $1.453 billion of its investment in the River Bend nuclear generating facility. The Texas Supreme Court found that the P.U.C. had "effectively disallowed" the $1.453 billion investment in a prior proceeding and could not consider its prudence in any future proceeding. The court reached this result even though the P.U.C.: (1) had made no determination as to the prudence of that investment but had expressly deferred the determination for further consideration and (2) had announced, after the close of evidence, specific new proof requirements for establishing the prudence of that investment.

Gulf States provides electric service to over 500,000 customers in Texas and Louisiana. To fulfill its legal obligation to provide continuous and adequate electric service to those customers,[1] Gulf States in 1971 decided to construct the River Bend nuclear generating station. Following an 18-month suspension of work, during which it reconsidered whether to go forward with River Bend, Gulf States began major construction in 1979. According to a 1988 P.U.C. determination, a reasonable 1979 estimate of the project's cost would have been $2.273 billion. When River Bend began commercial operation in 1986, its cost had risen to $4.5 billion.

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[1] Tex. Rev. Civ. Stat. Ann. Art. 1446C, § 38(a) (Vernon Supp. 1991).

On November 18, 1986, Gulf States petitioned the P.U.C. for an increase in rates to reflect River Bend's inclusion in rate base. In the resulting rate case, Texas P.U.C. Docket No. 7195, hearing examiners heard extensive evidence regarding the prudence of Gulf States' investment in River Bend. In its direct case, Gulf States presented a prima facie case to buttress the long-recognized legal presumption that its investment was prudent.[2] *See* Examiners Report at 90-101, App. at 136-49.[3] Opposing parties sought to rebut that presumption of prudence by presenting evidence falling into two general categories: (1) regression analyses suggesting that River Bend was more costly than other nuclear plants and (2) assertions that Gulf States had acted imprudently in certain specific respects. *See* Examiners Report at 101-14, 144-55, App. at 149-65, 200-13. Gulf States presented rebuttal testimony on each of these contentions. *See* Examiners Report at 114-22, 155-63, App. at 165-75, 214-27.

The Hearing Examiners Report, dated December 7, 1987, concluded that Gulf States had satisfied its "burden of justifying the costs of River Bend" through its presentation of a statistical analysis using regression techniques to compare the plant's cost with those of other similar plants. Examiners Report at 137, App. at 192. The Report further concluded that Gulf States' statistical analysis was the most reliable presented and supported a finding of prudence as to all but $274 million of Gulf States' River Bend investment.[4] Examiners Report at

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[2] *See, e.g., Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n*, 262 U.S. 276, 289 n.1 (1923) (Brandeis, concurring) ("Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown.").

[3] Excerpts from the Examiners Report are reproduced in the appendix at pages 109 to 284.

[4] In a January 5, 1988 memorandum to the P.U.C. Commissioners, correcting errors in the Examiners Report, the Examiners stated

137-40, 164, App. at 192-96, 227-28; Proposed Findings of Fact 160-64, App. at 260.

Only at this point, on review of the Examiners Report, and well after the close of evidence, did the P.U.C., *sua sponte*, announce a new, very specific evidentiary requirement for demonstrating prudence. Rejecting the analysis of the Examiners, the P.U.C. refused to rely on statistical analysis of comparative plant costs as proof rebutting claims that River Bend's cost was too high. The Commission also rejected, without explanation, the Examiners' finding that 46 percent of the plant's cost growth could be attributed to regulatory causes. *See* Examiners Report at 131, App. at 184; Proposed Finding of Fact 128, App. at 257; Final Order deleting Proposed Finding of Fact 128, App. at 61.

Rather, the P.U.C. for the first time made it known that it would adopt a decisional approach not suggested by any party nor considered by the Examiners. It would limit its prudence determination in Docket No. 7195 to $2.273 billion—the amount which the Commission determined would have been a reasonable estimate of River Bend's costs when construction began in earnest in 1979.[8]

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that the "recommended River Bend imprudence disallowance should be 8.3 percent [$253 million] rather than nine percent [$274 million]."

[8] The Company's 1979 decision to restart construction was the prudence issue most strongly and extensively challenged in Docket No. 7195. The Commission unanimously agreed with the Examiners' recommendation that this decision was prudent. The Examiners had determined $2.273 billion was a reasonable 1979 estimated cost in that context and the Commission based its initial prudence determination on that same amount. Examiners Report at 78-86, App. at 123-32; Final Order, Finding of Fact 164, App. at 64. The Examiners' determination of a reasonable 1979 estimate was not, and could not have been cited as, a reasonable final construction cost.

Because Gulf States provides electric service in both Texas and Louisiana, the prudence of River Bend was at issue in both states. Subsequent to the Texas Examiners Report, but prior to the Texas

With respect to the remaining investment, the Commission decided that Gulf States would have to present studies justifying all cost growth above that Commission-determined 1979 estimate. Thus, no prudence determination was made with respect to the $1.453 billion of Gulf States' investment which exceeded that estimate.[6] The Commission expressly concluded that (1) a determination as to the prudence of Gulf States' $1.453 billion investment remaining above the Commission-determined 1979 estimate would be held in abeyance and (2) Gulf States would have the opportunity to provide further evidence on the prudence of that investment. *See* Final Order Meeting Transcripts at 2239-60, App. at 285-99.[7]

The P.U.C.'s Final Order, dated May 16, 1988, reflected the P.U.C.'s determination to hold $1.453 billion of Gulf States' investment in abeyance.[8] Findings of Fact 164 and 164A provided that the P.U.C. was making a finding neither of prudence nor of imprudence with respect to Gulf States' investment above the 1979 estimate.[9] App.

Final Order Meeting, the Louisiana Public Service Commission decided to disallow $1.4 billion of Gulf States' investment in River Bend on the grounds that the company should not have restarted construction of the plant. *In re Gulf States Util. Co.*, La. P.S.C., Docket No. U-17282 (Dec. 15, 1987). The Texas Commission reached an opposite conclusion on the prudence of the restart decision. However, by adopting the new proof requirement discussed in the text, the Texas Commission deferred rate-base recognition of precisely the same amount.

[6] A total of $2.075 billion was invested in the River Bend plant above the Commission-determined 1979 estimate, of which $1.453 billion was provided by Gulf States.

[7] In Texas, the Final Order Meeting is the procedure by which the P.U.C. reviews examiners' reports. Excerpts of the Final Order Meeting transcript are reproduced in the appendix at pages 285 to 301.

[8] The Final Order is reproduced in the appendix at pages 38 to 108.

[9] *Finding 164*: "The preponderance of the evidence in this case establishes that $2.273 billion of River Bend capital costs were

at 64. Conclusion of Law 10 provided that the investment found to be neither prudent nor imprudent would be held in abeyance, not disallowed:

> . . . [T]he Commission may reexamine on rehearing or in a subsequent proceeding the prudence and reasonableness of those River Bend construction costs regarding which the evidence is inadequate to support a finding of either prudence or imprudence.

App. at 85. The P.U.C.'s decision to hold $1.453 billion of Gulf States' investment in abeyance and to provide a further opportunity for examination of that cost growth was thus consistent with the fact that it had prescribed specific new requirements for demonstrating prudence after the close of evidence.[10]

Pursuing the course of action indicated by the Commission, Gulf States filed a new rate case (P.U.C. Docket No. 8702) in March, 1989. In that case, Gulf States sought, among other things, further consideration of the

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prudently and reasonably incurred. The evidence is inadequate to support a finding of either prudence or imprudence with regard to construction costs in excess of $2.273 billion, with the exception of the costs related to the 50-month schedule and TDI, addressed in Findings of Fact Nos. 133 and 145."

Finding 164A: "GSU's share of all River Bend capital costs in excess of $2.273 billion should be excluded from plant in service *at this time* for lack of sufficient evidence as to the prudence and reasonableness of those costs. The amount which should be included in plant in service, given GSU's 70 percent share of the plant, is $1.5911 billion." (emphasis added).

[10] In accordance with the Commission's express statements in the Final Order Meeting and in Conclusion of Law 10, Gulf States sought rehearing to present evidence on the prudence of the $1.453 billion in cost growth. However, one Commissioner had resigned and the remaining two could not agree on rehearing, so Gulf States' motion was denied by operation of law. Multiple parties—including Gulf States—sought review of the Final Order by filing appeals in the 250th District Court of Travis County, Texas. Those appeals were consolidated and are now pending in that court (Docket No. 447,502).

remaining $1.453 billion River Bend investment supported by the new studies on cost growth which the Commission had sought. On April 13, 1989, the Cities for Affordable Utility Rates and the Office of Public Utility Counsel filed a petition for a declaratory judgment or an injunction in the 250th District Court of Travis County, Texas. They sought to prevent the P.U.C. from considering the prudence of Gulf States' $1.453 billion investment that had been held in abeyance in P.U.C. Docket No. 7195. Over objections by Gulf States and the P.U.C., the district court entered a permanent injunction, holding that the P.U.C. was precluded from considering the prudence of Gulf States' $1.453 billion investment except on any remand from the administrative appeal in P.U.C. Docket No. 7195. App. at 28-31. It is the Texas Supreme Court order upholding this injunction from which Gulf States now seeks review by writ of certiorari.[11]

Gulf States and the P.U.C. both appealed the district court's injunction to the Court of Appeals for the Third Supreme Judicial District of Texas. The court of appeals dissolved the injunction, concluding that the P.U.C. was not precluded from considering the prudence of an investment that it had expressly held in abeyance. The court of appeals stated:

> The rule of res judicata, however, has no application here. In its order, the Commission explicitly postponed the determination of one of Gulf States' major claims. The Commission's action in this respect may be compared to that of the trial court in severing a claim and proceeding separately with it. . . . No one would countenance a suggestion that res judicata bars litigation of the severed claim.

777 S.W.2d at 817, App. at 26 (citation omitted).

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[11] The district court initially consolidated the injunction action (Docket No. 462,014) into the administrative appeal from P.U.C. Docket No. 7195 (Docket No. 447,502). But, on the same day it granted a permanent injunction, the court severed the cases, designating the injunction action as Docket No. 447,502-A.

The petitioners below then filed applications for a writ of error to obtain review from the Supreme Court of Texas. Gulf States and the P.U.C. supported the court of appeals' decision. As it had in the court of appeals and the district court, Gulf States, in its brief opposing the writ, expressly relied on a decision of this Court, *United States v. Utah Construction and Mining Co.*, 384 U.S. 394 (1966), for the proposition that preclusion could not apply. Gulf States' Brief in Response to Applications For Writ of Error at 13-14 ("Only matters that have been finally adjudicated and determined can be deemed conclusive of the rights of the parties in subsequent actions."); Brief of Appellant Gulf States [in the Court of Appeals] at 8-9 ("Before the preclusive effects of *res judicata* or collateral estoppel apply, there must first be an actual resolution of the disputed facts after adequate opportunity for litigation."); Brief of Gulf States Utilities Company [to the District Court] on Res Judicata and Collateral Estoppel Issues at 12 (same).[12]

Without reference to Gulf States' federal rights, the Texas Supreme Court reversed the judgment of the court of appeals and affirmed that of the district court. Concluding that the P.U.C. lacked the statutory authority to hold the prudence of the $1.453 billion investment in abeyance, the Court held that "[b]y stating that GSU failed to meet its burden of proof on the prudence of the $1.453 billion, the P.U.C. *effectively disallowed* that amount from rate base." 798 S.W.2d at 564, App. at 6 (emphasis added). It held that collateral estoppel and res judicata precluded Gulf States from litigating the prudence of the $1.453 billion investment in any future rate proceeding.[13] It should be noted that the Texas

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[12] Relevant sections of Gulf States' briefs setting forth its federal claims to the courts below are reproduced in the appendix at pages 302 to 314.

[13] Gulf States anticipates that respondents may argue that the Texas Supreme Court opinion lacks the finality necessary for this

Supreme Court made no claim that the prudence of the $1.453 billion had been determined by the Commission. The court decided only that the Commission had "effectively disallowed" this amount by a ruling on adequacy of proof, adopted by the Commission in the belief that further proof on the prudence of that investment could be received. *Id.* The only action taken by the Texas Supreme Court was to sustain the district court injunction barring litigation of that prudence issue in future proceedings. It took no action aimed at ensuring that the Commission would further consider its rate treatment of the $1.453 billion investment in light of its present knowledge that it did not have statutory authority to defer a decision on that investment.

The dissent would have held that preclusion did not apply since the P.U.C. "made only a partial determina-

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Court to grant review. By holding that the P.U.C. "effectively disallowed" $1.453 billion of Gulf States investment and referring only to Gulf States' right to substantial evidence review of the P.U.C. decision (798 S.W.2d at 565 n.7, App. at 9-10), the Texas Supreme Court decision could ultimately have the effect of being a final determination of the prudence issue. In this regard, it is significant that the Texas Supreme Court decision came on review of an independent action for equitable relief, separate from the proceeding in which the P.U.C. deferred the prudence determination. Moreover, in the administrative appeal of the P.U.C. decision, the district court has stated: "the effect of the Supreme Court's decision and opinion is that the P.U.C. has made a final determination against GSU on the issue of the prudence of River Bend costs over $2.273 billion." Letter Order, Docket No. 447,502, February 5, 1991.

Under these circumstances, Gulf States should not be made to risk a later finding that the Texas Supreme Court decision is final. *See Matthews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976) (even statutory finality requirements should be construed, if possible, so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered). This is especially true since this Court has come to apply a pragmatic approach to finality. *E.g., Bradley v. Richmond School Bd.*, 416 U.S. 696, 722-23 n.28 (1974); *see also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-85 (1975).

tion of what costs were reasonable and prudent and held in abeyance the balance of the issue. . . ." 798 S.W.2d at 565, App. at 11-12. Citing this Court's decision in *Utah Construction*, the dissent stated: because "the Commission did not properly resolve the issue before it . . . neither res judicata nor collateral estoppel may operate to preclude claims or issues. . . ." 798 S.W.2d at 569, App. at 19.

The Supreme Court of Texas overruled motions for rehearing filed by Gulf States and the P.U.C. without comment. It did so despite the fact that Gulf States' motion reiterated that federal issues were present and had been left unaddressed by the Court's opinion.

REASONS FOR GRANTING THE WRIT

I. THE TEXAS SUPREME COURT'S DECISION RAISES SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTIONS WITH RESPECT TO THE PRECLUSIVE EFFECT OF AGENCY DECISIONS.

A. The Court Should Determine that the *Utah Construction* Standards for Giving Agency Decisions Preclusive Effect Are Applicable to the States and Are Compelled by Due Process.

The decision of the Texas Supreme Court completely ignores the standards enunciated in *United States v. Utah Construction and Mining Co.*, 384 U.S. 394 (1966), for determining when an agency decision may be given preclusive effect. The issue whether the *Utah Construction* standards are binding upon the states presents a federal constitutional issue which merits this Court's attention.

In *Utah Construction*, this Court held that the Board of Contract Appeals' resolution of a contract dispute could be given collateral estoppel effect where: "the Board was acting in a judicial capacity when it considered the . . . claims, the factual disputes resolved were clearly relevant to issues properly before it, and both

parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings." 384 U.S. at 422. This Court explained that the courts have not hesitated to apply res judicata where "an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties had an adequate opportunity to litigate." *Id.* *Utah Construction* has become the leading case for determining when a state or federal administrative decision can be given res judicata or collateral estoppel effect. *See, e.g., University of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986) (citing *Utah Construction* as authority for giving preclusive effect to determination of a state agency that an anti-discrimination statute had not been violated); *see generally* Note, *Collateral Estoppel Effects of Administrative Agency Determinations: Where Should Federal Courts Draw the Line?*, 73 Cornell L. Rev. 817 (1988).

Notwithstanding *Utah Construction's* importance, this Court has never determined whether the standards enunciated in that case are fundamental requirements of constitutional due process, rather than simply principles of federal administrative law not binding on the states. The Court should grant certiorari in this case so that it can declare that the *Utah Construction* standards are constitutionally mandated.

This Court has recognized that an adequate opportunity to litigate "entails . . . the procedural requirements of due process." *E.g., Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-81, 483 n.24 (1982) (collateral estoppel does not apply "when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity to litigate the claim or issue.'").

The Court should clearly rule that what *Utah Construction* termed a resolution of disputed issues of fact by the administrative tribunal is a constitutional re-

quirement. It is fundamentally unfair to preclude litigation of an issue never resolved by the agency. Moreover, without an agency decision so resolving the dispute, meaningful judicial review becomes impossible. For this reason, the Court should declare that *Utah Construction's* refusal to apply preclusion in the absence of an agency resolution of a disputed issue enunciates a requirement of due process. *See, e.g., Jensen v. Administrator of Fed. Aviation Admin.*, 641 F.2d 797, 799 (9th Cir. 1981) (due process requires that for meaningful review of an agency decision, the agency must have articulated standards governing its determination), *vacated as moot*, 680 F.2d 593 (9th Cir. 1982); *see also St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, concurring: "The supremacy of law demands that there shall be an opportunity to have some court decide . . . whether the proceeding in which the facts were adjudicated was conducted regularly"); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). *But cf. Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 582-84 (1985) (Article III does not bar Congress from requiring arbitration of disputes among regulated parties, without also affording substantial review by tenured judges of arbitrators' decisions).[14]

The question whether the standards of *Utah Construction* are constitutionally mandated and binding on state agencies is an important issue because administrative agencies often make decisions—and indeed, like the P.U.C. here, alter proof requirements—with few procedural formalities. As one recent commentary pointed out, adminis-

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[14] The third *Utah Construction* requirement—that the agency be acting in a judicial capacity—also counsels against applying preclusion to ratemaking proceedings, which are essentially legislative in nature. In the last decade, however, several states have applied preclusion to administrative ratemaking determinations. *See generally* Ballam, *The Applicability of Res Judicata/Collateral Estoppel to Utility Ratemaking Proceedings*, 24 Am. Bus. L.J. 293 (1986).

trative agencies differ fundamentally from courts in this regard:

> Courts base decisions on the application of existing law to particular facts defined by evidence admitted according to strict limitations. Agencies, however, may use adjudication as a policymaking technique and focus as much on prospective policy goals and considerations as on the particular dispute before them.

Note, *supra*, 73 Cornell L. Rev. at 836. Because administrative decisionmakers may be less concerned with procedural regularity than are the courts, it is often fundamentally unfair to give preclusive effect to their decisions. This is especially true where, as here, the agency was using adjudication as a policymaking technique. To the extent it is binding on the states by virtue of the Fourteenth Amendment, *Utah Construction* provides a minimal procedural floor below which agency decisions may not be given preclusive effect. This case thus presents an opportunity to provide guidance to the state courts on an important constitutional issue, while correcting a specific, manifest injustice.

II. THE TEXAS SUPREME COURT'S DECISION IS INCONSISTENT WITH THE DUE PROCESS STANDARDS SET FORTH IN *UTAH CONSTRUCTION*.

Before a state may give res judicata or collateral estoppel effect to a ruling in a state administrative proceeding, the proceeding must satisfy the requirements of the Due Process Clause. "A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment." *Kremer*, 456 U.S. at 482. The Texas Supreme Court's decision in this case demonstrates the need for this Court to provide further guidance to the states on when administrative decisions may be given preclusive effect.

A. Preclusion Cannot Apply Because the Texas P.U.C. Never Resolved the Prudence or Imprudence of the $1.453 Billion Investment Which It Held in Abeyance.

As the dissenting opinion below recognized, one of *Utah Construction's* requirements for giving preclusive effect to an administrative decision is that "the agency must properly resolve the dispute before it." 798 S.W.2d at 569, App. at 19 (citing *Utah Construction*, 384 U.S. at 422). Application of preclusion here is inconsistent with *Utah Construction* because the P.U.C. expressly chose not to determine the issue before it, *i.e.*, whether Gulf States' $1.453 billion investment was prudently expended.

It is plain that the P.U.C. never intended to make any decision on the prudence of that investment. The Commission's own Chairman, in dissenting to the Final Order, described the P.U.C.'s action as a decision "to hold in abeyance $1.453 billion of the investment in the River Bend Nuclear Plant." Final Order at 4, App. at 41. The P.U.C.'s Final Order explicitly states that "the evidence is inadequate to support a finding of either prudence or imprudence with regard to construction costs in excess of $2.273 billion. . . ." Finding of Fact 164, App. at 64. The Commission's determination that Gulf States had not met its burden of proving the prudence of the $1.453 billion in River Bend expenditures (Conclusion of Law 18A) cannot be read in isolation. It was only after the close of evidence that the P.U.C. required justification for all cost growth over a figure which was first determined and made known to the Company when the Examiners Report was issued. Nor can Conclusion of Law 18A be read independently of Conclusion of Law 10, which stated that "the Commission may reexamine, on rehearing or in a subsequent proceeding the prudence and reasonableness of those River Bend construction costs regarding which the evidence is inadequate to support a finding of either prudence or imprudence." The Commission's only decision with respect to the $1.453 billion in cost growth above

its determination of a reasonable 1979 estimate was that it would consider the rate-base treatment of that amount upon receipt of further specific evidence explaining the cost growth, either on rehearing or in a future proceeding. Conclusion of Law No. 10 so states. App. at 85.

The transcripts of the Final Order Meeting of the P.U.C. also conclusively demonstrate that the Commission's intention to hold $1.453 billion temporarily out of rate base was based upon the premise and conclusion that this investment could be examined further in subsequent proceedings. All three Commissioners repeatedly made clear that the Commission intended no "disallowance" and no "write-off" of the costs which the P.U.C. held in "abeyance" in Docket No. 7195.[15]

The Texas Supreme Court's conclusion that the P.U.C. "effectively disallowed" the $1.453 billion investment transforms the Commission's decision into something it was not intended to be. It is idle speculation to assume that the P.U.C. would have made a $1.453 billion disallowance if it believed it could not hold that portion of capital investment in abeyance and take up the matter in a later proceeding. The Texas Supreme Court's decision thus violates *Utah Construction's* holding that only an

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[15] *See e.g.*, Final Order Transcript ("Tr.") at 3318, App. at 300 (Commissioner Greytok: "We have a portion of that plant held in abeyance, but we do not have a disallowed portion of that plant."); Tr. at 3517, App. at 301 (Commissioner Greytok: "I will go back and look at it again, but I am concerned that we not get into the record the statement that the quote, disallowed portion of River Bend. It is held in abeyance, and we need to understand that in what we're doing here."); Tr. at 3126-27, App. at 300 (Commissioner Campbell: "This commission has specifically stated by majority vote that that amount of River Bend that they didn't prove up was held in abeyance with them having an opportunity to retry it. There is to be no write-off as a loss of that amount."); Tr. at 2243, App. at 288 (Chairman Thomas: "the advantage to this plan is that it is based upon an abeyance which would allow the Company to come back in and attempt to prove these costs at a later time. . . .")

agency decision actually resolving the issue before it may be given preclusive effect.

A conscious and express determination of the issues is especially important in the ratemaking context. This Court has said:

> the court must determine whether the [rate] order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable. The Court's responsibility is . . . to assure itself that the Commission has given *reasoned consideration to each of the pertinent factors.*

Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968) (emphasis added). The reviewing court cannot fulfill its responsibility where the absence of a final agency decision prevents it from knowing how the agency assessed the issues.

The result of applying preclusion in this case is startling in its harshness and its utter failure to comply with elemental standards of due process. Over $1.453 billion of investor-supplied funds may be expropriated by the State of Texas without any determination whatever that those funds were imprudently expended. The Texas Supreme Court did not rule that these expenditures had been imprudent. The court ruled only that the legal effect of deferring a decision and expressing a desire for additional evidence is, effectively, a disallowance. That result clearly was unintended by the agency charged by statute with setting just and reasonable rates. The result occurred because the P.U.C. adopted new and detailed proof requirements in the proceeding's final stages, under the belief that Gulf States would have the opportunity to present the evidence desired by the Commission. By denying Gulf States this opportunity, through a ruling of first impression that the Commission lacked authority to defer a decision, the Texas Supreme Court decision seized

the funds of Gulf States' investors without any semblance of due process.

B. Preclusion Cannot Apply Because Gulf States Was Denied a "Full and Fair" Opportunity To Be Heard by the P.U.C.'s Alteration of the Proof Requirements Following the Close of Evidence.

Utah Construction denies preclusive effect to an agency proceeding in which the parties did not have an adequate opportunity to present their case. 384 U.S. at 422. In this case, the requirement of an adequate opportunity to litigate is intimately related to the requirement of an agency decision resolving the prudence issue. The P.U.C. did not, and could not, resolve the prudence of the $1.453 billion in cost increases where its post-hearing change in methodology had denied Gulf States a full and fair opportunity to litigate the prudence of that investment. The Texas Supreme Court, however, improperly applied preclusion principles to block the Commission's further consideration of the $1.453 billion investment, thereby depriving Gulf States of the opportunity to meet the P.U.C.'s newly-announced proof requirement.

A full and fair opportunity to litigate is effectively denied when preclusion is applied in a situation where, as here, an agency enunciated new and specific proof requirements after the close of the evidence, believing that it could provide the party having the burden of proof the opportunity to meet that standard. This Court has held that the doctrine of preclusion is inapplicable where a party faced a different standard of proof in a prior proceeding. *See, e.g., One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) (acquittal on criminal smuggling charges did not bar later civil forfeiture proceeding); *see also Saunders v. Shaw*, 244 U.S. 317 (1917) (failure to remand to give plaintiff an opportunity to present evidence violates due process where appellate court changes legal standard after plaintiff has presented case).

The Examiners concluded that Gulf States had satisfied its burden of justifying the plant's cost through

its presentation of statistical regression analysis studies.[18] They also concluded that Gulf States had reasonably justified a conclusion that 46 percent of the plant's cost growth could be attributed to regulatory concerns. The Commission concluded, in the proceeding's final stages, after evidence had closed, that it would adopt an entirely new decisional approach: It would reject reliance on statistical analysis and would make no finding on the impact of regulatory concerns on cost growth; it would base its prudence decision on its own determination of a reasonable estimated cost of the plant when construction began and would determine the prudence of any and all growth in cost over that level after giving the Company an opportunity to present studies analyzing that cost growth.

In denying Gulf States the opportunity to meet the P.U.C.'s newly announced standard of proof, the Texas Supreme Court denied Gulf States an adequate opportunity to litigate. Only when the Commission announced how it would proceed did Gulf States know (a) that the $2.273 billion Commission-determined estimate for 1979 would be the baseline for cost-growth analysis and (b) that detailed studies analyzing all cost growth over that figure would be required to satisfy the Commission on the prudence of cost growth.

Under *Utah Construction*, an adequate opportunity to litigate is an essential element of due process. The decision below invites courts to say that it is a utility's hard luck if it is precluded from recovery of a major investment because a state administrative agency either (1) committed an error of law or (2) increased the quantum of proof required of the utility after the close of evidence, using adjudication as a policymaking technique. The so-

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[18] The Examiners used the results of Gulf States' regression analysis as the basis for disallowing nine percent (later amended to 8.3 percent) of the plant's cost.

cietal effects of so avoiding difficult and unpopular decisions are not to be underestimated. Absent assurances that they will be treated fairly, utility investors will demand higher returns, precisely at the time when many sections of the nation face shortages in the generation of electric power.[17] This will lead to higher rates for all consumers.

Moreover, utility behavior responds to perception of regulatory risk. Electric industry trade literature in recent years contains frequent discussions of the hazards involved in pursuing new construction projects. *See, e.g.*, Perrault, *Downsizing Generation: Utility Plans for the 1990's*, Public Utilities Fortnightly, 15, 15-17 (Sept. 27, 1990). Some utilities have responded to these hazards by deferring needed generation or by building facilities (such as gas turbines) which have shorter lead times and hence less regulatory risk, but which may have higher operating costs than other kinds of facilities. *See id.* Consumers, of course, will bear the costs of these decisions.

This case thus presents an opportunity for this Court to provide further guidance to the states on the applicability of *Utah Construction's* standards while correcting the manifestly unjust result the Texas Supreme Court has visited upon Gulf States' investors. The Court should grant certiorari to protect important consumer interests in an orderly and predictable ratemaking process.

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[17] One industry expert has predicted that, in the next decade, the United States will need as much as 150,000 megawatts of new generating capacity to meet increased demand and to replace antiquated facilities. Phillips, *The Future of Competitive Power Generation*, Public Utilities Fortnightly, 13 (March 15, 1990).

III. THIS CASE PRESENTS AN ISSUE OF NATIONAL SIGNIFICANCE BECAUSE THE TEXAS SUPREME COURT'S DECISION UPSETS THE CONSTITUTIONALLY REQUIRED BALANCE OF INVESTOR AND CONSUMER INTERESTS WITHOUT PROVIDING ANY MECHANISM FOR REESTABLISHING THAT BALANCE.

Certiorari is especially warranted in this case because, by giving preclusive effect to an agency decision which expressly did not resolve the disputed prudence issue, the Texas Supreme Court decision undermines the basic foundation of constitutional ratemaking that was enunciated in *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), and recently reaffirmed in *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

This Court has recognized that, in setting rates, the Constitution requires a just and reasonable end-result, which must balance ratepayer and investor interests. *Hope* requires that a rate-setting commission balance investor and consumer interests to ensure that just and reasonable compensation is achieved. 320 U.S. at 603 (1944); *see also Duquesne Light Co.*, 488 U.S. at 314 (1989) ("One of the elements always relevant to setting the rate under *Hope* is the return investors expect given the risk of the enterprise."). *Hope's* standards for just and reasonable rates coincide with the standards for ratemaking set by the U.S. Constitution. *Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968).

The P.U.C.'s Final Order holding in abeyance $1.453 billion of Gulf States' River Bend investment was an essential part of the Commission's attempt to balance consumer and investor interests. There was no ruling that this amount had been imprudently expended. Rather, having established new proof requirements for Gulf States to meet, i.e., a study analyzing *all* cost growth over the Commission's determination of a 1979 estimate, and believing itself to have the power to defer a decision

on the prudence issue, the P.U.C. ruled that Gulf States would have the opportunity to present further evidence on that cost-growth amount, either on rehearing or in a new proceeding. The end result of the Docket No. 7195 rate proceeding was rates that did not recognize $1.453 billion of investment. The decision to hold the $1.453 billion of Gulf States' investment in abeyance, rather than to disallow it, was a critical element in the P.U.C.'s attempt to reach a just and reasonable end result—a leg without which the proverbial stool could not stand.

By barring further consideration of the River Bend prudence issues in subsequent proceedings, upon a finding that the P.U.C. lacked the power to defer them, the Texas Supreme Court provided no mechanism through which the Commission could reestablish the balance of investor and consumer interests sought by the Commission and required by the Constitution. Indeed, the Texas Supreme Court precluded the P.U.C. from reestablishing the balance of interests that the P.U.C. had set based on contrary assumptions about its authority.[18] The Texas Supreme Court decision violates the Constitutional principle that, in accepting a regulated return on their in-

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[18] In this regard, the dissent noted that no matter how erroneous the P.U.C.'s assumption that it had the authority to defer the prudence issue, "we should not penalize a litigant for an error made by the Commission through no fault of the litigant." 798 S.W.2d at 565, App. at 11. The Texas court's majority opinion recognized the utility and ratepayer interests in the ratemaking process, but confined its concern in balancing those interests to the limits of *res judicata* principles. 798 S.W.2d at 565, App. at 9. The Texas court failed to consider the broader balancing of interests in assessing the justness and reasonableness of the end result, as required by *Hope* and *Duquesne*. Gulf States could not have been expected to predict that even if the Texas Supreme Court concluded that the P.U.C. lacked the authority to defer the prudence issue, it would not provide an opportunity for the P.U.C. to reestablish the balance of consumer and investor interests required by the Constitution. As such, Gulf States raised this issue in a timely manner on rehearing before the Texas Supreme Court. *See* App. at 309-314 (Gulf States' Motion for Rehearing).

vestment, investors in a regulated industry are entitled to an end result which balances their interests with those of consumers.[19]

If the Texas Supreme Court opinion is sustained on review, its impact on Gulf States' investors would be harsh and severe. Those investors would be denied any opportunity to recover or earn a return on the $1.453 billion in funds they provided in reliance on good faith treatment by the regulatory process, even though those funds have been invested in a generation project dedicated to providing the public with an essential service and even though that investment has never been found imprudent. As noted in the previous section, absent assurances that utility investors will be treated in at least a constitutionally minimally acceptable manner, they will demand a higher rate of return, thereby increasing costs to consumers.

In short, preclusion may not be applied here because further consideration by the Commission of the $1.453 billion investment is necessary to a proper balancing of consumer and investor interests. To achieve this result, it is necessary for this Court to exercise its supervisory power over the Texas Supreme Court and to reverse its decision.[20]

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[19] This Court noted probable jurisdiction in *Kansas City Power & Light Co. v. State Corp. Comm'n*, *probable jurisdiction noted*, 479 U.S. 1082, *appeal dismissed*, 483 U.S. 1036 (1987)—a case which presented similar issues of a state adopting a new valuation method which did not allow a constitutionally required return on investment in nuclear plant. That case was settled prior to decision. *Duquesne Light Co.* involved the issue of what constitutes a constitutionally required return of prudently incurred investment in electric generation facilities.

[20] In our federal system, only this Court can correct federal constitutional errors of state supreme courts. Moreover, in this case, Gulf States could not have sought protection from lower federal courts because the Johnson Act, 28 U.S.C. § 1342 (1988), effectively prevents lower federal courts from reviewing state rate orders.

PRAYER FOR RELIEF

WHEREFORE, Gulf States respectfully prays that the Court grant this petition for a writ of certiorari to the Supreme Court of Texas in this matter.

Respectfully submitted,

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